

## **EXHIBIT F**

Pages 1 - 15 and 33 - 48

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE FERN M. SMITH, JUDGE

FILED  
OCT 15 1998

CINEBASE SOFTWARE, INC., )  
                            ) RICHARD W. WIEKING  
PLAINTIFF,               ) CLERK, U.S. DISTRICT COURT,  
                            ) NORTHERN DISTRICT OF CALIFORNIA  
VS.                       ) NO. C-98-1100-FMS  
                            )  
MEDIA GUARANTY TRUST, INC.; )  
ALLEN L. BROWN; NATALIA X. )  
KROL; JOSEPH ROZENFELD; THOMAS )  
WILLS; CARL REISINGER; AND )  
KATHERINE TOPPER,         )  
                            )  
DEFENDANTS.              )

ORIGINAL

65  
L

SAN FRANCISCO, CALIFORNIA  
WEDNESDAY, AUGUST 26, 1998

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:           CHRISTENSEN, MILLER, FINK, JACOBS,  
                              GLASER, WEIL & SHAPIRO, LLP  
                              2121 AVENUE OF THE STARS, 18TH FLOOR  
                              LOS ANGELES, CALIFORNIA 90067

BY:    MARK G. KRUM, ESQ.  
        KEVIN J. LEICHTER, ESQ.

FOR DEFENDANT:           WEIL, GOTSHAL & MANGES LLP  
                              2882 SAND HILL ROAD, SUITE 280  
                              MENLO PARK, CALIFORNIA 94025

BY:    JARED BOBROW, ESQ.  
        DOUGLAS E. LUMISH, ESQ.

REPORTED BY:    JUDITH N. THOMSEN, CSR, RPR, RMR, FCRR  
                         OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT

1       WEDNESDAY, AUGUST 26, 1998

3:59 P.M.

2           THE CLERK: CALLING CIVIL ACTION C-98-1100, CINEBASE  
3 SOFTWARE VERSUS MEDIA GUARANTY TRUST.

4           COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE  
5 RECORD.

6           MR. BOBROW: GOOD AFTERNOON, YOUR HONOR. MY NAME IS  
7 JARED BOBROW REPRESENTING THE DEFENDANTS IN THIS MATTER. AND  
8 WITH ME IS DOUG LUMISH, MY COLLEAGUE. AND ALSO AT COUNSEL  
9 TABLE ARE --

10          THE COURT: EXCUSE ME.

11          MR. BOBROW: BLESS YOU.

12          THE COURT: THANK YOU.

13          MR. BOBROW: -- ARE TWO OF THE DEFENDANTS IN THIS  
14 MATTER. DR. ALLEN BROWN AND MS. NATASHA KROL ARE ALSO AT  
15 COUNSEL TABLE.

16          THE COURT: ALL RIGHT. THANKS, MR. BOBROW.

17          MR. KRUM: GOOD AFTERNOON, YOUR HONOR. MARK KRUM.  
18 AND WITH ME IS MY COLLEAGUE KEVIN LEICHTER ON BEHALF OF  
19 PLAINTIFF CINEBASE SOFTWARE.

20          THE COURT: ALL RIGHT. THANK YOU, MR. KRUM.

21          I HAVE A NUMBER OF QUESTIONS THAT I WOULD LIKE TO  
22 ASK. AND I THINK PRIMARILY, MR. KRUM, THEY GO TO YOU. AND  
23 THEN AFTER I HAVE ASKED MY QUESTIONS, WE CAN -- WE CAN TAKE  
24 SOME TIME IF WE NEED IT TO HAVE ANY ADDITIONAL COMMENTS YOU  
25 ALL WANT TO MAKE.

1           MR. KRUM, AS TO MS. TOPPER -- I THINK -- IS IT  
2 MS. TOPPER WHO IS THE MARKETING PERSON?

3           MR. BOBROW: YES.

4           MR. KRUM: THAT'S CORRECT, YOUR HONOR.

5           THE COURT: OKAY. DID SHE EVER DEVELOP AN ACTUAL  
6 MARKETING REPORT OR ANY DOCUMENTS FOR YOU WHILE SHE WAS THERE?

7           MR. KRUM: THE ANSWER, YOUR HONOR, IS YES WITH  
8 RESPECT TO DOCUMENTS; NO WITH RESPECT TO MARKETING REPORT.

9 THE PARTICULAR MARKETING REPORT THAT GETS MUCH DISCUSSION IN  
10 THE PARTIES' PAPERS WAS THE REPORT PREPARED BY THE THIRD  
11 PARTY, WEINSTOCK --

12           THE COURT: OKAY.

13           MR. KRUM: -- WHICH MS. TOPPER IS ALLEGED TO HAVE  
14 DELIVERED TO MS. KROL AFTER MS. KROL HAD LEFT CINEBASE. AND  
15 INDEED, YOUR HONOR, THE TRANSCRIPT WE SUBMITTED FOR MS. TOPPER  
16 ADMITS THAT. BUT SHE DID NOT PREPARE THAT DOCUMENT, NOR ARE  
17 THERE ANY OTHER REPORTS AS SUCH THAT SHE PREPARED. INSTEAD,  
18 IT WAS SIMPLY DOCUMENTS IN THE ORDINARY COURSE OF BUSINESS.

19           THE COURT: OKAY. IS IT YOUR BELIEF THAT SHE TOOK  
20 DOCUMENTS, OR IS IT SIMPLY THIS REPORT, THE THIRD-PARTY  
21 REPORT, THAT YOU BELIEVE?

22           MR. KRUM: IT'S JUST THE THIRD-PARTY REPORT, YOUR  
23 HONOR.

24           THE COURT: OKAY. WHAT DO YOU MEAN BY "SOFTWARE  
25 ARCHITECTURE"? I AM HAVING A TERRIBLE TIME FIGURING OUT

1 EXACTLY WHAT IT IS -- WHAT, QUOTE, "IT," CLOSED QUOTE, IS.

2 MR. KRUM: CERTAINLY, YOUR HONOR. ONE OF THE  
3 ANSWERS TO THAT AND ANY OF A NUMBER OF QUESTIONS YOU MIGHT ASK  
4 IS IN SOME RESPECTS, GIVEN SUBSTANCE, IF YOU WILL, BY  
5 PLAINTIFF'S IDENTIFICATION OF TRADE SECRETS, WHICH WAS  
6 EXCHANGED -- NOT EXCHANGED -- WAS SUBMITTED TO THE DEFENDANTS  
7 IN THIS LAWSUIT. AND IT'S A RATHER SUBSTANTIAL AND LENGTHY  
8 LIST, WHICH, MUCH TO MY SURPRISE, I DID NOT FIND IN THE PAPERS  
9 HERE. AND IF IT WOULD BE ACCEPTABLE TO THE COURT, I WOULD  
10 LIKE TO -- INSTEAD OF READING A LOT OF THIS TO YOU HAND UP A  
11 COPY.

12 THE COURT: OKAY. DO YOU HAVE IT, COUNSEL?

13 MR. BOBROW: THANK YOU.

14 MR. KRUM: (INDICATING)

15 THE CLERK: THANK YOU.

16 MR. KRUM: IF I MIGHT, YOUR HONOR, I WOULD DIRECT  
17 YOUR ATTENTION TO THE PAGE NUMBER 2 OF THIS DOCUMENT AND IN  
18 PARTICULAR TO SUBHEAD "B," WHICH READS, QUOTE:

19 "THE SOFTWARE ARCHITECTURE OF THE DIGITAL MEDIA  
20 MANAGEMENT SOFTWARE DEVELOPED BY CINEBASE, UP TO AND  
21 INCLUDING THE TIME DEFENDANTS DEPARTED THEIR  
22 EMPLOYMENT AT CINEBASE."

23 AND LISTED IMMEDIATELY BELOW THAT, AS YOUR HONOR CAN  
24 SEE, ARE DESCRIPTIONS OF DOCUMENTS WHICH, OF COURSE, SET OUT  
25 THE ARCHITECTURE.

1           THE COURT: OKAY.

2           MR. KRUM: AND I COULD AT SOME LENGTH ATTEMPT TO ADD  
3 TO THAT BUT PROBABLY WOULD NOT ACCOMPLISH ANYTHING.

4           THE COURT: OKAY. ALL RIGHT. THANKS, MR. KRUM.

5           AND THESE QUESTIONS AREN'T IN ANY PARTICULAR ORDER.  
6 I JOTTED THEM DOWN AS I THOUGHT ABOUT THEM OR THEY WERE RAISED  
7 BY VARIOUS PAPERS.

8           I AM PUZZLED BY YOUR CLAIM THAT ONE OF THE TRADE  
9 SECRETS THAT DEFENDANTS WENT OFF WITH IS THEIR TECHNICAL  
10 KNOW-HOW.

11          IT WOULD SEEM TO ME THAT CONCEPTUALLY IF THAT IS A  
12 TRADE SECRET, THEN EVERY PERSON WHO GOES TO A JOB, LEARNS  
13 SOMETHING AND LEAVES, TAKES WITH HER TECHNICAL KNOW-HOW. I  
14 MEAN, DO YOU EXPECT PEOPLE TO HAVE A LOBOTOMY OR SOMETHING?

15          MR. KRUM: THAT'S A GOOD QUESTION, YOUR HONOR. AND  
16 THE ANSWER TO THE LOBOTOMY QUESTION, OF COURSE, IS, GENERALLY,  
17 NO. IN THIS CIRCUMSTANCE, YES.

18          THE COURT: GENERALLY NO BUT SPECIFICALLY YES?

19          MR. KRUM: LET ME EXPLAIN WHY.

20          THE COURT: IS IT COVERED IN THEIR HEALTH PLAN?

21          MR. KRUM: I BELIEVE NOT, YOUR HONOR.

22          THE COURT: OKAY.

23          MR. KRUM: THE PARTIES' PAPERS MAKE MUCH OF THE  
24 QUESTION AS TO WHETHER THE DEFENDANTS KNEW WHAT THEY ARE DOING  
25 NOW BEFORE THEY CAME TO CINEBASE OR WHETHER THEY LEARNED WHAT

1 THEY ARE DOING NOW AT CINEBASE AND, ACCORDING TO US, DOING  
2 WHAT CINEBASE WAS DOING, CARRYING OUT CINEBASE'S BUSINESS  
3 PLAN, GOING AFTER THE SAME MARKET, USING THE SAME PRODUCT.

4 AND THEREIN LIES THE ANSWER, YOUR HONOR. BECAUSE IF  
5 IN FACT THEY ARE SIMPLY USING KNOWLEDGE ACCUMULATED OVER THE  
6 YEARS OF DOING WHAT THEY DO, TO DO SOMETHING OTHER THAN WHAT  
7 WE CLAIM -- BECAUSE, YOUR HONOR, WE CLAIM, QUITE SIMPLY, THAT  
8 THEY HAVE WALKED OFF, LOCK, STOCK AND BARREL, SO TO SPEAK,  
9 WITH OUR BUSINESS PLAN, OUR BUSINESS, OUR MARKET, OUR PRODUCT,  
10 OUR PEOPLE AND WHAT YOU PARTICULARLY ASKED ABOUT, THE  
11 TECHNICAL KNOW-HOW.

12 NOW, IN THAT REGARD, YOUR HONOR, THE NOTION OF  
13 NEGATIVE KNOWLEDGE, I THINK, IS WHAT WE ARE TALKING ABOUT. WE  
14 ARE NOT TALKING ABOUT, BY THE WAY, JUST GENERAL SKILLS -- HOW  
15 TO CODE, HOW TO DESIGN ARCHITECTURE. THAT IS NOT WHAT WE ARE  
16 TALKING ABOUT HERE.

17 IF DR. BROWN WENT BACK TO XEROX AND RESUMED DOING  
18 WHAT HE WAS DOING AT XEROX INSTEAD OF HAD GONE TO MEDIA  
19 GUARANTY AND CONTINUED DOING WHAT HE WAS DOING AT CINEBASE AND  
20 WHAT WE CONTEND HE LEARNED TO DO AT CINEBASE, NONE OF US WOULD  
21 BE HERE.

22 AND SO WITH RESPECT TO THAT PARTICULAR SUBJECT, YOUR  
23 HONOR, OF NEGATIVE KNOWLEDGE, THERE IS, OF COURSE, CASE LAW  
24 FOR THE PROPOSITION THAT WHEN YOU LEARN HOW TO DO SOMETHING IN  
25 PARTICULAR -- AND LIKEWISE, YOUR HONOR, WHEN YOU LEARN HOW NOT

1 TO DO IT -- THAT IS SOMETHING THAT CAN BE SUBJECT TO TRADE  
2 SECRET PROTECTION.

3 AND OUR PARTICULAR CONTENTION HERE, YOUR HONOR, IS  
4 GIVEN WHAT THEY ARE DOING NOW -- AND THE DOCUMENTS MAKE THIS  
5 QUITE CLEAR. I COULD TAKE THE BALANCE OF EVERYONE'S DAY,  
6 SIMPLY COMPARING PORTIONS OF THEIR BUSINESS PLAN WITH OUR  
7 BUSINESS PLAN, AND YOU'D SAY IF THE BUSINESS PLAN -- IF OUR  
8 BUSINESS PLAN WERE COPYRIGHTED, THAT WOULD BE A PRIMA FACIE  
9 VIOLATION, THE POINT THERE BEING -- I DON'T THINK THERE IS  
10 MUCH DISPUTE THAT THEY ARE DOING SUBSTANTIALLY THE SAME THING.

11 LET'S SAY THEY ARE NOT COMPETING BECAUSE THEY ARE  
12 NOT GOING AFTER THE SAME MARKET. WE RESPOND TO THAT.

13 WHAT THEY ARE DOING, YOUR HONOR, AS EVIDENCED BY THE  
14 FACT THAT ACCORDING TO THE DOCUMENTS IN THE RECORD NOW, THEY  
15 HAD -- I BELIEVE, THEY HAD AN ARCHITECTURE DESIGNED IN  
16 DECEMBER OF LAST YEAR -- MONTHS, TWO OR THREE MONTHS, AFTER  
17 THEY STARTED -- THAT THEY EXPECT TO HAVE A PRODUCT TO MARKET  
18 SPRING OF NEXT YEAR, I BELIEVE IT IS.

19 HOW DID THAT HAPPEN?

20 THE ANSWER, YOUR HONOR, IS THEY ARE DOING WHAT THEY  
21 DID BEFORE, AND THEY ARE USING WHAT THEY LEARNED AT CINEBASE  
22 IN HOW TO DO IT.

23 BY THE WAY, THE CITE, YOUR HONOR -- IT'S IN THE  
24 REPLY BRIEF. BUT IT'S THE INFORMATION -- INFORMATION -- THE  
25 QUOTE IS "INFORMATION THAT HAS A COMMERCIAL VALUE FROM A

1 NEGATIVE VIEWPOINT." AND THAT'S THE COURTESY TEMPORARY  
2 SERVICE CASE.

3 IF THEY LEARNED HOW TO DO WHAT THEY ARE DOING, YOUR  
4 HONOR, AND IF THEY LEARNED HOW NOT TO DO WHAT THEY'RE DOING,  
5 DURING OUR EMPLOY, THEY HAVE GONE INTO BUSINESS COMPETING  
6 AGAINST US -- AND BY THE WAY, YOUR HONOR, THIS ISN'T MAKING  
7 WIDGETS. THERE IS NO DISPUTE IN THE RECORD BEFORE THE COURT  
8 THAT WHAT IS GOING ON HERE IS SOMETHING THAT IS DONE BY VERY  
9 FEW COMPANIES. IT'S A NASCENT INDUSTRY.

10 AND IN POINT OF FACT, YOUR HONOR, THAT'S WHY THE  
11 OPPORTUNITY WAS SO GREAT FOR THEM. THEY DIDN'T THINK CINEBASE  
12 WAS DOING IT WELL. THEY DIDN'T THINK CINEBASE, ACCORDING TO  
13 DR. BROWN'S DEPOSITION TESTIMONY, HAD THE FINANCING TO DO WHAT  
14 IT OUGHT TO DO, SO THEY WENT OUT AND GOT THE FINANCING AND DID  
15 IT ON THEIR OWN.

16 SO THE ANSWER, YOUR HONOR, IS YES, THEY CANNOT --  
17 THEY CANNOT USE THAT INFORMATION.

18 I DIRECT YOUR HONOR, FOR INSTANCE, TO A COUPLE CASES  
19 WE CITED. ONE IS THE PEPSICO CASE FROM THE SEVENTH CIRCUIT.  
20 AND THAT CASE HAD TWO ASPECTS -- HAD ONE ASPECT, YOUR HONOR.  
21 THIS CASE HAS TWO.

22 THE PEPSICO CASE POINTED OUT THAT THE TRADITIONAL  
23 TRADE SECRET CASE IS WHEN THE EMPLOYEE LEAVES WITH SOME  
24 PARTICULAR TECHNOLOGY OR TECHNICAL KNOW-HOW AND GOES TO A  
25 EXERT AND COMPETITOR, AND THE CONCERN IS HE IS GOING TO USE

1 THAT.

2 WELL, WE HAVE THAT. IN FACT, OUR CLAIM IS THEY ARE  
3 USING IT.

4 THE PEPSICO CASE, HOWEVER, WAS A DIFFERENT CASE.  
5 THERE THE PARTICULAR PERSON WHO LEFT HAD PARTICULAR MARKETING  
6 KNOWLEDGE AND INFORMATION THAT HE ACQUIRED DURING HIS TENURE  
7 AT PEPSICO, WHICH THE DISTRICT COURT THERE DETERMINED HE COULD  
8 NOT USE IN THE COURSE OF FULFILLING HIS RESPONSIBILITIES IN A  
9 SIMILAR POSITION AT PILLSBURY IN THEIR -- I THINK IT WAS THEIR  
10 GATORADE DIVISION. WE HAVE THAT ELEMENT HERE AS WELL, YOUR  
11 HONOR.

12 NOW, IT HAS BEEN CHARACTERIZED AS INEVITABLE USE AND  
13 SOMETHING NEW. THAT'S NOT THE CASE.

14 THE UNIFORM TRADE SECRETS ACT TALKS ABOUT THREATENED  
15 USE. AS THE PEPSICO CASE POINTS OUT, THREATENED USE SUBSUMES  
16 THE NOTION OF INEVITABLE USE.

17 IN FACT, TO DIVERT A MOMENT, YOUR HONOR, THAT WAS  
18 ONE OF THE REASONS CALIFORNIA, AMONG OTHER STATES, ENACTED THE  
19 UNIFORM TRADE SECRETS ACT, SO WE WOULD HAVE THE SAME LAW,  
20 WHETHER WE WERE HERE OR IN ILLINOIS, FOR INSTANCE, WHERE IT'S  
21 ENACTED AS WELL.

22 IN THIS CASE, AS IN THE PEPSICO CASE, GIVEN WHAT THE  
23 RECORD BEFORE THE COURT SHOWS THE DEFENDANTS ARE DOING, WHICH  
24 IS DEVELOPING AN IDENTICAL OR SUBSTANTIALLY IDENTICAL PRODUCT,  
25 DIRECTED AT THE SAME MARKET, THEY CANNOT HELP BUT USE THE

1 INFORMATION THEY LEARNED AT CINEBASE.

2 AND, YOUR HONOR, THIS IS NOT US THINKING THIS UP.  
3 THE DOCUMENTS BEAR THIS OUT. THE DOCUMENTS PRODUCED BY THE  
4 INVESTMENT BANKER, I THINK, POINT OUT THAT THE FOUNDERS -- OR,  
5 NO, IT WAS BY CINEBASE ITSELF. IT SAYS, "THE FOUNDERS HAVE  
6 DONE IT BEFORE."

7 WELL, I SUPPOSE THE RESPONSE IS, WELL, THAT'S  
8 BECAUSE THEY ARE TALKING ABOUT WHAT DR. BROWN DID AT XEROX  
9 WITH ASTORIA. WELL, THE PAPERS TALK ABOUT THE DIFFERENCES IN  
10 THAT.

11 THE POINT, YOUR HONOR, IS, SURE, PEOPLE CAN GO  
12 COMPETE. IF HE HAD GONE TO -- IF DR. BROWN HAD GONE TO XEROX,  
13 IF THE PEOPLE HAD GONE BACK TO DO WHAT THEY WERE DOING  
14 BEFORE -- ACTUALLY, YOUR HONOR, IF THEY HAD DONE SOMETHING  
15 OTHER THAN EFFECTIVELY DUPLICATE THE BUSINESS OF CINEBASE, IT  
16 WOULD BE A DIFFERENT SITUATION. WE WOULD NOT HAVE THE  
17 SITUATION WE HAVE HERE WHERE, YES, YOUR HONOR, THEY HAVE TO  
18 HAVE A LOBOTOMY IF THEY ARE GOING TO DO WHAT THEY'RE DOING.

19 THE COURT: WELL, LET ME TELL YOU WHY I AM TROUBLED  
20 WITH THIS. AND I HAVE A -- I DIDN'T READ PEPSICO. I AM NOT  
21 GOING TO PRETEND I READ THE CASES BECAUSE I DIDN'T. BUT I  
22 HAVE LIVED IN THE BAY AREA ALL MY LIFE, AND I REMEMBER WHEN  
23 HOOP WASN'T MUCH MORE THAN A NASCENT INDUSTRY, NOR WAS  
24 FAIRCHILD, NOR WAS INTEL, NOR WAS MICROSOFT, NOR WAS WHATEVER.  
25 AND IT'S HARD TO FIND A TECHNICAL COMPANY IN SILICON VALLEY

1 THAT WASN'T STARTED BY PEOPLE WHO CAME FROM SOMEWHERE ELSE.  
2 AND ALL OF THOSE PEOPLE CAME TO THEIR -- OR LEFT THEIR OLD  
3 COMPANIES AND CAME TO THEIR NEW COMPANIES CLEARLY WITH  
4 TECHNICAL KNOW-HOW AND PROBABLY WITH THINGS THEY COULDN'T NOT  
5 USE.

6 AND HOW DO YOU DRAW THE LINE BETWEEN SIMPLY A NEW  
7 INDUSTRY AND THE RIGHT OF PEOPLE TO BUILD ON THAT INDUSTRY  
8 AND, YOU KNOW, GO ON WITH IT AND THIS, WELL, YOU CAN'T DO IT  
9 BECAUSE YOU CAN'T NOT USE IT THEORY.

10 MR. KRUM: THE QUESTION IS RIGHT ON THE MARK, AND I  
11 DON'T MEAN TO BE PATRONIZING. THAT'S EXACTLY RIGHT. THE  
12 ANSWER, YOUR HONOR, IS IN THE RECORD HERE. IT WAS NOT  
13 HYPERBOLE WHEN WE SAID IN OUR PAPERS WHAT WAS UNUSUAL ABOUT  
14 THIS CASE IS THAT THE PEOPLE PLANNED TO COMPETE, GENERATED THE  
15 DOCUMENT TRAIL THAT REFLECTED THAT THEY PLANNED TO COMPETE AND  
16 GENERATED THE DOCUMENT TRAIL THAT REFLECTED THAT THEY HAVE  
17 UNDERTAKEN TO COMPETE.

18 THIS ISN'T SOMEBODY WHO WENT FROM ONE COMPANY TO  
19 START ANOTHER COMPANY THAT WAS DOING SOMETHING ELSE, WHERE  
20 THEY BUILT UPON SOMETHING THEY HAD LEARNED.

21 ONE OF THE CASES THE DEFENDANTS CITED, YOUR HONOR --  
22 I BELIEVE THE NAME OF THE CASE WAS RIGAINS -- WAS AN  
23 INTERESTING CASE IN THAT IT SPEAKS TO THIS POINT: THERE THE  
24 DEFENDANT DID SOMETHING DIFFERENT THAN WHAT THE PRIOR EMPLOYER  
25 HAD DONE.

1           THE POINT HERE, YOUR HONOR, IS THAT'S NOT THE CASE.  
2 THE PARTIES' PAPERS IDENTIFY THE NUMBER OF COMPETITORS THAT  
3 EITHER MEDIA GUARANTY HAS OR CINEBASE HAS. IT'S NOT A LONG  
4 LIST, YOUR HONOR. IT'S A VERY, VERY SHORT LIST. DEPENDING ON  
5 WHO IS MAKING THE LIST, YOU MIGHT BE ABLE TO COUNT IT ON YOUR  
6 THUMBS. CERTAINLY YOU COULD COUNT IT ON ONE HAND.

7           AND WE ARE NOT SUGGESTING, YOUR HONOR, THAT THESE  
8 FOLKS CANNOT GO OUT AND PROCURE EMPLOYMENT. WE ARE SUGGESTING  
9 THAT THEY CANNOT GO OUT AND DO WHAT THEY HAVE DONE, WHICH IS  
10 EXACTLY WHAT WE ARE DOING.

11           THE COURT: WELL . . .

12           MR. KRUM: IF THEY HAD GONE, YOUR HONOR, TO ANY OF A  
13 MULTITUDE OF OTHER COMPANIES TO DO SOMETHING OTHER THAN  
14 EXACTLY WHAT CINEBASE DOES, WHY WOULD CINEBASE CARE. AND THE  
15 ANSWER IS, YOU KNOW, GOD'S SPEED.

16           AND THE REASON THAT'S NOT THE CASE, YOUR HONOR, AS  
17 THIS RECORD MAKES CLEAR, IS THEY DIDN'T DO THAT. THEY DIDN'T  
18 MOVE ON. THEY JUST MOVED SIDEWAYS. AS THEIR DOCUMENT SAID,  
19 THEY TOOK THE PRODUCT AND RAN. AND THAT'S THE DIFFERENCE,  
20 YOUR HONOR. THAT'S THE FACTUALLY DISTINGUISHING  
21 CHARACTERISTIC BETWEEN THIS CASE AND THE KIND OF CASES TO  
22 WHICH YOU REFER.

23           THE COURT: DON'T THEY HAVE THE RIGHT TO GO OUT AND  
24 TRY TO DO WHAT YOU DO BETTER, CHEAPER, FASTER?

25           MR. KRUM: PROVIDED THEY DON'T TAKE OUR TRADE

1 SECRETS, THEY SURE DO, YOUR HONOR.

2 THE COURT: OKAY.

3 MR. KRUM: THE QUESTION THAT WE TALKED ABOUT BEFORE  
4 IS WHETHER THEY CAN DO THAT. AND THAT, OF COURSE, IS A  
5 FUNCTION OF WHAT THEY ARE DOING. AND IN THAT RESPECT, YOUR  
6 HONOR, THE DEFENDANT'S PAPERS ATTEMPT TO SAY THEY ARE NOT  
7 COMPETING. I AM SURE YOUR HONOR SAW THAT. IT WAS PREDICATED  
8 ON SUPPOSEDLY DIFFERENT MARKETS. WELL --

9 THE COURT: YES. AND THAT WAS THE NEXT QUESTION I  
10 WAS GOING TO ASK YOU.

11 AS I UNDERSTAND IT, MS. KROL -- NO, I GUESS  
12 MS. TOPPER, IT WAS, WAS WORKING ON A PLAN FOR MARKETING, FOR  
13 ADVERTISING, RIGHT?

14 MR. KRUM: THAT WAS MS. KROL, YOUR HONOR.

15 THE COURT: MS. KROL. I'M SORRY.

16 MR. KRUM: YES.

17 THE COURT: AND THEN YOU TOLD HER NOT TO WORK ON IT  
18 ANYMORE OR CINEBASE TOLD HER NOT TO WORK ON IT ANYMORE. AND,  
19 AS FAR AS I CAN TELL FROM THE PAPERS, CINEBASE HAS NOT BEEN  
20 AND STILL HAS NOT BEEN IN THAT MARKET.

21 NOW, ARE YOU SERIOUS ABOUT IT OR DO YOU JUST WANT TO  
22 KEEP HER OUT OF IT? AND IF YOU ARE SERIOUS ABOUT IT, WHY DID  
23 YOU TELL HER TO STOP AND WHY ISN'T THERE PROOF THAT YOU ARE IN  
24 THE MARKET NOW?

25 MR. KRUM: WELL, WITH RESPECT TO THE -- WHAT

1 TRANSPired WITH MS. KROL, IN POINT OF FACT SHE WAS ADVISED TO  
2 DIRECT HER ATTENTION TO OTHER MATTERS. BUT THAT FOLLOWED, I  
3 BELIEVE, SOMETHING LIKE EIGHT MONTHS OF WORK WHERE SHE WAS  
4 DOING THE LONG-RANGE PLANNING AND DEVELOPMENT OF MARKETS,  
5 PRINCIPALLY -- PRINCIPALLY, THE ADVERTISING MARKET.

6 NOW, THE EVIDENCE IN THE RECORD, YOUR HONOR,  
7 INCLUDES SOME TESTIMONY FROM MICHAEL ABRAMS, THE INDIVIDUAL  
8 WHO IS NOW THE COO OF CINEBASE.

9 AND THAT ACTUALLY BRINGS TO MIND SOMETHING -- IF I  
10 MIGHT PAUSE FOR A MOMENT, YOUR HONOR.

11 THE COURT: SURE.

12 MR. KRUM: I DISCUSSED WITH MR. BOBROW BEFORE THE  
13 HEARING, AT SOME POINT -- AND I THINK I HAVE REACHED IT NOW,  
14 AND I MAY HAVE REACHED IT PREVIOUSLY -- I AM GOING TO BE  
15 TALKING ABOUT THE MATTERS THAT CINEBASE TODAY DOES NOT WISH  
16 THE DEFENDANTS TO KNOW. AND SO MY CONCERN IS AT SOME POINT IN  
17 THIS HEARING THEY ARE GOING TO HEAR THINGS IN THE COURSE OF  
18 THIS LITIGATION THE ATTORNEYS HAVE BY AGREEMENT TREATED AS  
19 ATTORNEYS' EYES ONLY. AND SO I INTERRUPT MY OWN RESPONSE TO  
20 YOUR ANSWER BECAUSE I THINK I AM THERE NOW.

21 THE COURT: OKAY.

22 MR. KRUM: AND IF I SAY WHAT I AM GOING TO SAY, THEN  
23 I HAVE CREATED A PROBLEM.

24 IN VIEW OF THAT, I AM GOING TO ASK THAT MR. BROWN  
25 AND MS. KROL BE EXCUSED.

1           THE COURT: ALL RIGHT. I AM GOING TO ASK THAT THEY  
2 DO BE EXCUSED JUST FOR THIS SHORT PERIOD OF TIME.

3           MR. LUMISH: THANK YOU, YOUR HONOR.

4           THE COURT: IF YOU WOULD. THANK YOU, AND THAT THIS  
5 PORTION OF THE TRANSCRIPT WILL GO UNDER SEAL.

6           MR. KRUM: THANK YOU, YOUR HONOR.

7           THE COURT: -- AND BE PART OF THE PROTECTIVE ORDER  
8 OR AGREEMENT THAT'S -- IS THERE ONE ON FILE, AN ACTUAL  
9 PROTECTIVE ORDER?

10          MR. KRUM: THERE IS, YOUR HONOR, YES.

11          THE COURT: OKAY.

12          (MR. BROWN AND MS. KROL LEAVE COURTROOM)

13          (PAGES 16 - 32 UNDER SEAL)

14

15

16

17

18

19

20

21

22

23

24

25

1           THE COURT: OKAY. WE CAN TAKE THIS OUT NOW AND PUT  
2 IT BACK ON THE RECORD.

3           GO AHEAD, MR. BOBROW.

4           MR. BOBROW: THANK YOU, YOUR HONOR.

5           WOULD YOU LIKE ME TO ADDRESS THE REASONABLE EFFORTS  
6 POINT? BECAUSE I WOULD BE HAPPY TO DO THAT.

7           THE COURT: OKAY. THAT'S FINE, SURE.

8           MR. BOBROW: AS YOU KNOW, IN ORDER TO STATE A TRADE  
9 SECRET CLAIM -- AND THAT IS THE ONLY TYPE OF CLAIM THAT IS  
10 BEFORE YOU IN THIS PRELIMINARY INJUNCTION MATTER -- NOT ONLY  
11 MUST THERE BE AN IDENTIFICATION OF A TRADE SECRET -- THAT IS,  
12 THAT SOMETHING IS ACTUALLY SECRET BUT THERE MUST BE EFFORTS  
13 THAT ARE REASONABLE UNDER THE CIRCUMSTANCES TO MAINTAIN IT.  
14 AND THE RECORD BEFORE YOUR COURT -- BEFORE THE COURT IS CLEAR  
15 THAT THERE HAS BEEN NO REASONABLE EFFORT.

16           THROUGHOUT THE DEPOSITIONS AND IN THE DECLARATIONS,  
17 THERE WAS REPEATED TESTIMONY THAT CINEBASE HAD NO EMPLOYMENT  
18 AGREEMENTS WITH ANYONE, MUCH LESS WITH THE DEFENDANTS, BUT NOT  
19 WITH ANYBODY. THEY DIDN'T REQUIRE THEIR SOFTWARE ENGINEERS TO  
20 SIGN EMPLOYMENT AGREEMENTS, THEIR MARKETING PEOPLE, THE PEOPLE  
21 WHO WERE IN THEIR SOLUTIONS GROUP, NOBODY.

22           WERE THERE ANY CONFIDENTIALITY AGREEMENTS SIGNED BY  
23 THE EMPLOYEES? NO. THE EVIDENCE ON THAT IS UNDISPUTED.

24           SOME OF THE PEOPLE WHO WERE VERY HIGH UP IN THE  
25 COMPANY HAD BEEN WORKING AT THE COMPANY FOR A LONG TIME, IN

1 SOME CASES FOR YEARS, WITHOUT EVER SIGNING AN EMPLOYMENT  
2 AGREEMENT OR A CONFIDENTIALITY AGREEMENT.

3 NOW, IF ONE WERE THINKING ABOUT WHAT WOULD BE  
4 REASONABLE STEPS UNDER THE CIRCUMSTANCES FOR A COMPANY THAT  
5 ALLEGEDLY THINKS THAT CERTAIN INFORMATION IS CONFIDENTIAL,  
6 WOULDN'T THE FIRST THING THAT YOU DO BE TO HAVE THOSE PEOPLE  
7 SIGN CONFIDENTIALITY AGREEMENTS? I THINK SO.

8 THE COURT: WHAT IF YOU ASKED THEM TO SIGN THE  
9 AGREEMENTS AND THEY JUST SAY, "NO." DO YOU FIRE THEM, OR IS  
10 THERE SOMETHING ELSE THAT YOU DO AS A SECOND STEP?

11 MR. BOBROW: I THINK, TYPICALLY, IN THAT SITUATION  
12 THAT YOU DO -- IN VIRTUALLY EVERY COMPANY THAT I COUNSEL IN  
13 THIS SITUATION IS WHEN THEY COME THROUGH THE DOOR AND YOU  
14 INTERVIEW THEM, IF THEY ARE NOT PREPARED AS A CONDITION OF  
15 EMPLOYMENT TO SIGN A CONFIDENTIALITY AGREEMENT, THEN YOU DON'T  
16 HIRE THEM. BECAUSE THAT CAN CREATE A RISK THAT THAT PERSON  
17 MAY NOT OBEY AND PROTECT THE CONFIDENTIAL INFORMATION.

18 SO THE KINDS OF THINGS THAT COMPANIES ARE ACTING  
19 REASONABLY -- AND THE CASE LAW SUPPORTS THIS SHOWS -- IS THAT  
20 YOU HAVE YOUR EMPLOYEES SIGN AGREEMENTS WHEN THEY COME IN.  
21 YOU HAVE THAT -- YOU HAVE THEM SIGN CONFIDENTIALITY  
22 AGREEMENTS. YOU IMPLEMENT A COMPANY POLICY, WHICH CINEBASE  
23 DIDN'T DO, THAT SAYS, "THESE ARE THE STEPS AND PROCEDURES AND  
24 GUIDELINES AND RULES THAT WE WILL FOLLOW TO PROTECT TRADE  
25 SECRETS."

1           THE EVIDENCE IS UNDISPUTED THAT THERE WAS AND IS NO  
2 CONFIDENTIALITY POLICY AT CINEBASE.

3           THERE ARE OTHER THINGS THAT YOU WOULD ALSO DO UNDER  
4 THOSE CIRCUMSTANCES, SUCH AS TELL PEOPLE, "THIS CATEGORY OF  
5 INFORMATION IS SECRET. THIS CATEGORY ISN'T. THESE ARE THE  
6 THINGS THAT WE NEED TO DO." AND YOU TRAIN PEOPLE TO TRY TO  
7 PROTECT THAT INFORMATION SO THAT THEY KNOW WHAT IS SECRET AND  
8 WHAT ISN'T, SO THAT THEY CAN SAY, "THIS INFORMATION IS  
9 CONFIDENTIAL. THIS ISN'T. THIS IS GENERAL SKILL AND  
10 EXPERIENCE, AND THIS IS SOMETHING SPECIAL THAT REALLY NEEDS TO  
11 BE PROTECTED."

12           AND THE EVIDENCE IS UNDISPUTED THAT THAT DID NOT  
13 HAPPEN IN A SINGLE CASE. CINEBASE TOLD NOBODY WHAT IT  
14 CONSIDERED SECRET, WHAT IT CONSIDERED CONFIDENTIAL.

15           IN FACT, THE REVERSE IS TRUE. THERE WERE -- AND,  
16 AGAIN, THE TESTIMONY IS UNDISPUTED ON THIS. THERE WERE DOZENS  
17 OF DOCUMENTS AT CINEBASE WHICH THEY ARE NOW CLAIMING ARE  
18 CONFIDENTIAL AND PROPRIETARY DOCUMENTS WHICH DON'T EVEN HAVE A  
19 CONFIDENTIALITY LEGEND ON THEM.

20           THERE ARE DOCUMENTS, FOR EXAMPLE, BUSINESS PLANS,  
21 THAT WERE JUST HANDED OUT WILLY-NILLY EVEN TO PROSPECTIVE  
22 EMPLOYEES BEFORE THEY HAD SIGNED CONFIDENTIALITY AGREEMENTS.

23           THERE ARE SOME OF THE DOCUMENTS THAT THEY ARE  
24 CLAIMING ARE PART OF THE SOFTWARE DOCUMENTATION AND  
25 ARCHITECTURE WHICH AREN'T STAMPED AS BEING CONFIDENTIAL.

1           AND IF YOU GO DOWN THROUGH THE TRADE SECRET LIST,  
2 YOU WILL SEE THAT THERE -- A REPEATED PATTERN OF INFORMATION  
3 NOT BEING STAMPED.

4           THIS WEINSTOCK REPORT THAT HAS CONSUMED AT LEAST  
5 HALF OF THE DISCUSSION IN THIS CASE, THIS REPORT THAT COST  
6 ABOUT \$10,000, PURCHASED FROM A THIRD PARTY AND CO-FUNDED BY  
7 TWO COMPANIES, AGAIN, THAT REPORT BEARS NO INDICIA OF  
8 CONFIDENTIALITY.

9           SO WHAT THE DEFENDANTS -- OR WHAT CINEBASE DOES  
10 INSTEAD IS SAY, "OH, THE LAW OF CALIFORNIA SAYS THAT THERE IS  
11 THIS IMPLIED OBLIGATION, AND THAT MAKES US REASONABLE UNDER  
12 THE CIRCUMSTANCES."

13          THAT'S PRECISELY NOT THE LAW. THE LAW IS THAT IN  
14 ADDITION TO ANY IMPLIED OBLIGATION THAT AN EMPLOYEE OR OFFICER  
15 MIGHT HAVE, IN ADDITION TO THAT, YOU HAVE TO TAKE EXTRA STEPS  
16 TO SAY, "THIS IS SECRET. WE ARE GOING TO HAVE EMPLOYEES AND  
17 OFFICERS AND THE LIKE SIGN DOCUMENTATION. WE ARE GOING TO  
18 KEEP THINGS UNDER LOCK AND KEY AND WE ARE GOING TO SEGREGATE  
19 THINGS ON A NEED-TO-KNOW BASIS. WE WILL STAMP IT  
20 CONFIDENTIAL." THOSE ARE THE THINGS THAT YOU DO.

21          WHY DO YOU NEED TO DO THAT? BECAUSE, AS YOUR HONOR  
22 POINTED OUT AT THE VERY BEGINNING OF ALL OF THIS, YOU NEED TO  
23 BE ABLE TO DISTINGUISH THAT WHICH IS GENERAL KNOWLEDGE,  
24 INDUSTRY EXPERIENCE AND PERSONAL EXPERIENCE FROM THAT WHICH IS  
25 ALLEGEDLY TRADE SECRET.

1           AND IN THIS PARTICULAR CASE THAT IS A VERY SPECIFIC  
2 PROBLEM. AND I THINK YOU HIT THE NAIL ON THE HEAD. BECAUSE  
3 IN THIS CASE WE ARE DEALING WITH PEOPLE WHO HAVE BEEN WORKING  
4 IN THE SOFTWARE INDUSTRY FOR YEARS. DR. ALLEN BROWN HAS BEEN  
5 WORKING IN THE SOFTWARE INDUSTRY FOR ABOUT 30 YEARS. HE HAS A  
6 PH.D. HE HEADED A MAJOR CORPORATION. HE WORKED AT XEROX  
7 PARK. HE HAS BEEN DOING THIS FOREVER.

8           AND ONE CANNOT SIMPLY SAY THAT THERE IS SOME  
9 UNDIFFERENTIATED KNOW-HOW OUT THERE DEALING WITH WRITING  
10 SOFTWARE AND THAT NOW DR. BROWN CANNOT GO OUT AND EARN A  
11 LIVELIHOOD AND EXERCISE HIS SKILL AND THE EXPERIENCE THAT HE  
12 HAS DEVELOPED OVER ALL OF THESE YEARS AND THAT HE CANNOT DO  
13 THAT. THAT IS WHAT THE LAW SPECIFICALLY SAYS YOU CANNOT DO.

14           SO WHAT DO YOU HAVE TO DO? YOU TAKE WHAT IS  
15 ALLEGEDLY TRADE SECRET, YOU TREAT IT AS A TRADE SECRET -- YOU  
16 TAKE REASONABLE STEPS TO PROTECT IT -- AND THEN YOU TELL  
17 PEOPLE, "THESE ARE THE TRADE SECRETS AND DON'T TREAD ON  
18 THESE."

19           NOW, THAT WASN'T DONE.

20           SO IT'S CLEAR, I THINK, AND EVEN AS A MATTER OF LAW  
21 THAT THEY CANNOT PROVE THE ESSENTIAL ELEMENT OF A TRADE SECRET  
22 CLAIM, WHICH IS THAT REASONABLE STEPS UNDER THE CIRCUMSTANCES  
23 WERE TAKEN.

24           NOW, THAT BEGS THE QUESTION, OF COURSE, AND REALLY  
25 THE TWO OTHER ASPECTS OF A TRADE SECRET CASE ON THE MERITS

1 WOULD BE, NUMBER ONE, WERE THERE ANY TRADE SECRETS? I MEAN,  
2 FORGET THE REASONABLE STEPS. WAS THERE ANYTHING THAT'S  
3 CONFIDENTIAL TO BEGIN WITH AND THAT IS A TRADE SECRET IN FACT?  
4 AND THEN, SECONDLY, WAS ANYTHING TAKEN?

5 AND I WOULD LIKE TO ADDRESS BOTH OF THOSE ISSUES  
6 BECAUSE, FRANKLY, I THINK THAT THERE HAS BEEN A LOT OF  
7 DISCUSSION IN THE LAST HALF AN HOUR AT ABOUT 80 OR 100,000  
8 FEET, AND I DON'T THINK THAT THAT'S WHERE AN INTELLIGENT  
9 DISCUSSION CAN BE HAD ABOUT WHETHER THERE HAS BEEN TRADE  
10 SECRET MISAPPROPRIATION.

11 WHY NOT? BECAUSE, AGAIN, THE PEOPLE WHO HAVE FORMED  
12 MEDIA GUARANTY, NUMBER ONE, HAVE A RIGHT TO EARN A LIVELIHOOD.  
13 CALIFORNIA HAS A STRONG POLICY AGAINST COVENANTS NOT TO  
14 COMPETE -- WHICH IS ESSENTIALLY WHAT, I THINK, CINEBASE IS  
15 TRYING TO DO HERE, IS SAY THESE PEOPLE CAN'T COMPETE. THEY  
16 CANNOT EARN A LIVING.

17 AND, IN FACT, IN THEIR PROPOSED ORDER WHAT THEY SAY  
18 IS THAT -- WHAT THEY WANT IS AN ORDER SAYING THAT THE  
19 DEFENDANTS CANNOT RUN A SOFTWARE COMPANY AND MUST CEASE DOING  
20 BUSINESS.

21 NOW, THAT ESSENTIALLY GOES TO THE CORE OF WHAT THEIR  
22 POSITION IS, IS THESE PEOPLE CAN'T COMPETE.

23 BUT THERE IS A VERY STRONG POLICY IN FAVOR OF THAT,  
24 WHICH IS, AGAIN, WHY IT'S VERY IMPORTANT TO FOCUS ON IS THERE  
25 ANYTHING THAT IS SECRET?

1 AND THE ANSWER IN THIS CASE IS NO.

2 NOW, THIS CASE BEGAN WITH CINEBASE SAYING, "YOU HAVE  
3 TAKEN OUR SOFTWARE. YOU HAVE TAKEN OUR CODE. WE KNOW IT.  
4 AND WE'RE GOING TO SHUT YOU GUYS DOWN."

5 AND THERE WERE SOME LETTERS THAT WERE SENT IN THE  
6 DECEMBER TIME FRAME. AND THEY WERE VERY -- THAT WAS ABOUT --  
7 ABOUT TWO WEEKS BEFORE THE CHRISTMAS HOLIDAY TIME. AND  
8 ESSENTIALLY THE ALLEGATION WAS THAT WE HAD STOLEN THE SOURCE  
9 CODE AND STOLEN RELATED INFORMATION TO THAT.

10 WHEN THIS LAWSUIT WAS FILED, WITHIN A WEEK OF ITS  
11 FILING, WE INVITED THE DEFENDANTS AND GAVE CINEBASE A PROPOSAL  
12 AND SAID, "LOOK, WE WILL LET YOU COME IN TO OUR FACILITIES.  
13 YOU CAN LOOK AT OUR COMPUTERS; YOU CAN LOOK AT OUR SERVERS;  
14 YOU CAN LOOK AT OUR FILES. YOU CAN TEAR THE PLACE APART, AND  
15 WE'LL HAVE A THIRD PARTY COME IN AND DO THAT UNDER A  
16 CONFIDENTIALITY AGREEMENT. IT WILL BE SOMEONE WHO BOTH  
17 PARTIES AGREE UPON. AND THAT PERSON CAN SEE IF WE HAVE  
18 ACTUALLY TAKEN ANYTHING."

19 AND THAT OFFER THAT WE MADE WAS FLATLY REJECTED. IT  
20 WAS REJECTED THE VERY NEXT DAY WITHOUT ANY DISCUSSION.

21 AND I THINK THAT THE REASON FOR THAT, YOUR HONOR,  
22 IS, AGAIN, THIS IS A CASE OF BLUSTER, NOT OF SUBSTANCE.

23 WHAT WE HAVE DONE SINCE THE LAWSUIT BEGAN IS  
24 PRODUCED TO CINEBASE OUR SOURCE CODE, OUR SOFTWARE  
25 SPECIFICATIONS AND RELATED DOCUMENTS. THEY HAVE HAD THIS

1 INFORMATION NOW FOR MONTHS.

2 AND WHAT YOU SEE IN THE REPLY PAPERS THAT ARE BEFORE  
3 YOU IS NOTHING ABOUT THE SOURCE CODE THAT WAS ALLEGEDLY TAKEN,  
4 AND THERE IS NO DISCUSSION OR ANALYSIS OR REVIEW OF ANY OF  
5 THAT SOURCE CODE.

6 WHY? BECAUSE OUR SOURCE CODE IS VERY DIFFERENT AND  
7 BECAUSE IT IS WRITTEN DIFFERENTLY AND IT IS BASED UPON A  
8 DIFFERENT PLATFORM.

9 LET ME COME BACK, THOUGH, TO THE POINT ABOUT SECRECY  
10 BECAUSE, AS I SAID, THE ORIGINAL FOCUS OF THIS IS IS THERE  
11 ANYTHING SECRET. AND THE ANSWER TO THAT IS NO AS TO EACH  
12 CATEGORY OF INFORMATION THAT THEY'VE -- THAT THEY ARE ALLEGING  
13 IS SECRET.

14 NUMBER ONE, THE SOFTWARE AND SOURCE CODE THAT WE  
15 HAVE BEEN TALKING ABOUT, A WEEK BEFORE CINEBASE FILED ITS  
16 COMPLAINT, IT ALSO FILED WITH THE COPYRIGHT OFFICE OVER 100 --  
17 CLOSE TO 200 PAGES OF SOURCE CODE FOR ITS OWN PRODUCT.

18 THAT SOURCE CODE IS NOW PUBLICLY AVAILABLE. IT IS  
19 AVAILABLE TO ANYBODY TO GO TO WASHINGTON, D.C. I CAN SIT DOWN  
20 IN THE COPYRIGHT OFFICE FOR AS LONG AS I WANT DAY AFTER DAY,  
21 AND I CAN REVIEW IT, I CAN TAKE NOTES, I CAN STUDY IT. IT IS  
22 NOW A PUBLIC DOCUMENT. IT IS NOT SECRET ANYMORE.

23 THE ONE THING I CAN'T DO, OF COURSE, IS I CAN'T GO  
24 TO THE COPYRIGHT OFFICE AND MAKE A COPY OF IT. THAT I CANNOT  
25 DO. BUT I CAN STUDY IT, I CAN TAKE NOTES ON IT, I CAN REVIEW

1 IT, I CAN THINK ABOUT IT, AND I CAN INSPECT IT EVERY DAY THAT  
2 THE COPYRIGHT OFFICE IS OPEN.

3 NOW, WHAT IS LEFT AFTER ALL OF THAT? NOTHING. IN  
4 FACT, THE TESTIMONY HAS BEEN IN THIS CASE THAT ONCE YOU KNOW  
5 WHAT'S ON FILE IN THE COPYRIGHT OFFICE, YOU KNOW ABOUT THE  
6 ARCHITECTURE, YOU KNOW ABOUT THE ALGORITHMS, YOU KNOW ABOUT  
7 THE DESIGN OF THE SYSTEM AS A WHOLE, YOU KNOW ABOUT PARTICULAR  
8 ROUTINES, THERE IS NOTHING LEFT AT THIS POINT. THE SOURCE  
9 CODE AND THE RELATED ARCHITECTURE ARE NOW PUBLIC INFORMATION.

10 SIMILARLY, AS TO THE ALLEGED MARKETING INFORMATION  
11 ABOUT WHICH THEY COMPLAIN, THE ONLY THING THAT HAS BEEN  
12 IDENTIFIED IN ANY CONCRETE WAY IS THIS NEIL WEINSTOCK REPORT,  
13 WHICH WE HAVE DISCUSSED. IT HAS NO INDICIA OF  
14 CONFIDENTIALITY. IT'S NOT STAMPED. IT WAS BROADLY CIRCULATED  
15 WITHIN THE COMPANY. IT IS CO-FUNDED WITH SOMEBODY WHO HAS  
16 COMPLETE RIGHTS TO DISSEMINATE IT.

17 WHERE IS THE SECRET IN THAT DOCUMENT? IT IS A  
18 \$10,000 REPORT THAT I COULD CALL UP NEIL WEINSTOCK TOMORROW  
19 AND ASK HIM TO REPRODUCE, AND HE WOULD GO AHEAD AND ACCESS HIS  
20 DATABASE, AND HE WOULD PULL UP THE SAME CANNED INFORMATION  
21 THAT'S IN THE DATABASE AND SPIT IT OUT IN ANOTHER REPORT, AND  
22 I COULD PAY HIM 10,000 BUCKS FOR THAT. THAT IS NOT A TRADE  
23 SECRET.

24 THE OTHER CATEGORY OF INFORMATION IS THIS CATEGORY  
25 OF KNOW-HOW. AND THEY SAY THAT WE HAVE THIS KNOW-HOW THAT WE

1 ALLEGEDLY TOOK A SECRET. I THINK THE ERRORS OF CAUSALITY HAVE  
2 BEEN REVERSED HERE.

3 THE THING TO REMEMBER IS THAT DR. BROWN AND THE  
4 PEOPLE THAT HE BROUGHT WITH HIM TO CINEBASE AND MS. KROL WERE  
5 RECRUITED TO COME TO CINEBASE.

6 WHY WERE THEY RECRUITED TO COME TO CINEBASE?  
7 BECAUSE THEY HAVE EXTENSIVE EXPERIENCE IN THE INDUSTRY. THEY  
8 HAVE EXTREME KNOWLEDGE AND SKILL AND CONTACTS AND ALL THE REST  
9 OF THE THINGS THAT PEOPLE LIKE, AND PEOPLE LIKE DR. BROWN AND  
10 MS. KROL AND THE OTHERS, BECAUSE THEY HAVE BEEN DOING THIS FOR  
11 SUCH A LONG TIME.

12 SO IT IS THE KNOW-HOW THAT THE -- THAT DR. BROWN AND  
13 THE OTHERS BROUGHT TO CINEBASE, NOT THE OTHER WAY AROUND. WE  
14 DIDN'T GET THERE AND ALL OF A SUDDEN LEARN HOW TO WRITE  
15 SOFTWARE OR LEARN HOW TO DESIGN A SOFTWARE ARCHITECTURE.  
16 THAT'S WHAT DR. BROWN HAD BEEN DOING FOR ABOUT 30 YEARS BEFORE  
17 HE CAME TO CINEBASE.

18 SO THE -- IN TERMS OF KNOW-HOW, THE ISSUE THERE IS  
19 WE CAME TO CINEBASE. WE HAD THE KNOW-HOW. CINEBASE HIRED THE  
20 DEFENDANTS IN THIS CASE BECAUSE CINEBASE DID NOT HAVE THE  
21 KNOW-HOW. THEY HAD A VERY PROPRIETARY PRODUCT WHICH HAD BEEN  
22 DEVELOPED ON THE CHEAP, AND THEY WANTED TO BRING SOME PEOPLE  
23 IN TO ACTUALLY MAKE A SOFTWARE PRODUCT. THEY HAD NO SKILLS  
24 AND NO ABILITY TO DO THAT THEMSELVES. SO THEY RECRUITED THE  
25 DEFENDANTS TO DO THAT. THAT IS A SITUATION WHERE THE

1 DEFENDANTS HAVE THE KNOW-HOW, NOT CINEBASE IN THIS CASE.

2 NOW, THE OTHER ISSUE IS IS THERE ANY EVIDENCE  
3 WHATSOEVER THAT ANYTHING THAT COULD POSSIBLY BE CONSIDERED TO  
4 BE A TRADE SECRET HAS ACTUALLY BEEN TAKEN?

5 AND I THINK WE NEED TO SPEND SOME TIME FOCUSING ON  
6 THAT BECAUSE, OBVIOUSLY, THAT'S AN ESSENTIAL ELEMENT IN THIS  
7 MATTER. AND IT MUST BE PROVED BY CINEBASE IN ORDER FOR THEM  
8 TO GET THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION.

9 AND, AGAIN, WHEN YOU LOOK AT THESE THINGS AT A VERY  
10 HIGH LEVEL, BASICALLY, THE ARGUMENT THAT I HEARD IS, WELL, WE  
11 WERE WORKING -- DR. BROWN AND MS. KROL AND OTHERS WERE WORKING  
12 AT CINEBASE. AND NOW THEY LEFT. AND THEY TALKED ABOUT  
13 LEAVING BEFORE THEY ACTUALLY LEFT, AND THEY TALKED A LITTLE  
14 BIT AND THEN THEY LEFT, AND NOW THEY'RE BASICALLY IN THE SAME  
15 BUSINESS GENERALLY.

16 NOW, WHAT'S THAT BUSINESS? THAT BUSINESS IS IN THE  
17 FIELD OF WHAT'S CALLED DIGITAL MEDIA MANAGEMENT.

18 THAT FIELD, YOUR HONOR, IS NOT A NASCENT BUSINESS.  
19 IT IS NOT SOME UPSTART. IT IS A MULTI-MILLION-DOLLAR ENDEAVOR  
20 AND HUGE MARKET IN WHICH COMPANIES LIKE SILICON GRAPHICS AND  
21 IBM AND APPLE AND INFORMIX AND ORACLE AND OTHER MAJOR PLAYERS  
22 HAVE BEEN IN THIS FOR A VERY LONG TIME. IT IS NOT AS THOUGH  
23 IT'S CINEBASE AND MEDIA GUARANTY AND THERE ARE TWO COMPANIES  
24 THAT ARE IN THIS FIELD. IT'S NOT THAT AT ALL. THERE HAVE  
25 BEEN COMPANIES WHO DEVELOP THIS SOFTWARE AND HAVE BEEN

1 DEVELOPING IT FOR YEARS. IT IS NOT A SMALL MARKET WHATSOEVER.

2 BUT LET'S TAKE A LOOK IN DETAIL AT WHETHER THERE HAS  
3 BEEN ANY MISAPPROPRIATION. AND THERE ARE REALLY TWO ISSUES, I  
4 THINK, THAT THE COURT SHOULD FOCUS ON.

5 NUMBER ONE IS TAKING A LOOK AT WHAT CINEBASE WAS  
6 DOING WITH ITS PRODUCT DEVELOPMENT AND WHAT WE ARE DOING.  
7 AND, AS WE SET FORTH IN THE PAPERS, THE PRODUCTS ARE NOT  
8 SIMILAR IN THE LEAST. SURE, THEY'RE SOFTWARE. WE ADMIT THAT.  
9 IT IS SOFTWARE FOR MANAGING A CERTAIN ASSET THAT'S CALLED  
10 MEDIA, AND THAT MEDIA CAN BE DOCUMENTS AND FILM CLIPS AND  
11 FILES AND ALL KINDS OF OTHER THINGS. BUT IT IS BASICALLY  
12 SOFTWARE.

13 NOW, WHAT WE DID IN THIS CASE, AS I SAID, IS WE  
14 TURNED OUR SOURCE CODE OVER AND, AGAIN, WE SEE NOTHING COMING  
15 BACK SAYING, "AHA, LOOK AT THIS ALGORITHM. LOOK AT THIS  
16 ROUTINE. LOOK AT THIS PIECE OF CODE. THIS IS COPIED. THIS  
17 IS LIFTED FROM WHAT WE DID." WE HAVE SEEN NOTHING LIKE THAT.

18 WHY NOT? BECAUSE THEY ARE FUNDAMENTALLY DIFFERENT.  
19 CINEBASE HAD A SYSTEM AND WAS WORKING ON A SYSTEM WHICH WAS  
20 BASICALLY WHAT'S CALLED AN OBJECT ORIENTED SYSTEM. THE  
21 DATABASE THAT WAS USED TO HOLD ALL OF THIS MEDIA AND DOCUMENTS  
22 AND OTHER THINGS WAS AN OBJECT ORIENTED SYSTEM. THAT'S A  
23 PARTICULAR KIND OF DATABASE, WHICH IS VERY DIFFERENT THAN  
24 WHAT'S CALLED A RELATIONAL DATABASE.

25 THAT IS THE TECHNOLOGY THAT MEDIA GUARANTY WILL BE

1 USING. IT'S A DIFFERENT WAY OF STORING INFORMATION, A  
2 DIFFERENT WAY OF ORGANIZING INFORMATION.

3 WHY IS THAT IMPORTANT? IT'S IMPORTANT BECAUSE THOSE  
4 DIFFERENCES BETWEEN OBJECT AND RELATIONAL DATABASES MEAN THAT  
5 YOU HAVE TO WRITE THE CODE DIFFERENTLY. I CAN'T JUST TAKE  
6 SOME SOFTWARE THAT'S WRITTEN FOR AN OBJECT DATABASE, TAKE IT  
7 OVER HERE, LOAD IT ONTO A PC AND RUN IT ON A RELATIONAL  
8 DATABASE. IT DOESN'T WORK. YOU CAN'T TAKE SOFTWARE THAT'S  
9 WRITTEN FOR AN OBJECT DATABASE AND THEN HAVE THAT RUN A  
10 RELATIONAL DATABASE. IT DOESN'T WORK THAT WAY.

11 AND THE TESTIMONY ON THAT FROM CINEBASE IS CLEAR.  
12 AND THE TESTIMONY ON THAT FROM THE DEFENDANTS IS CLEAR. YOU  
13 CAN'T JUST PLUG AND PLAY THESE THINGS. IT TAKES A LOT OF  
14 WORK.

15 ON THAT SCORE I THINK IT'S -- I THINK IT'S  
16 INTERESTING TO NOTE ONE OF THE EXHIBITS THAT MR. KRUM TALKED  
17 ABOUT WAS A SO-CALLED "PITCH" TO LEO BURNETT THAT WAS MADE.  
18 AND IN THAT DOCUMENT THAT HE REFERRED TO, THERE WAS SOME  
19 DISCUSSION ABOUT HAVING CINEBASE WORK TOGETHER WITH LEO  
20 BURNETT TO POTENTIALLY COME UP WITH A PRODUCT THAT WOULD USE A  
21 RELATIONAL DATABASE.

22 WHAT'S INTERESTING ABOUT THAT DOCUMENT, YOUR HONOR,  
23 IS THAT IT BASICALLY SAYS THAT THE FUNDING FOR THAT PROJECT  
24 WOULD NOT EVEN BE BY CINEBASE. THE PROPOSAL THAT THEY WERE  
25 MAKING WAS, "HEY, LEO BURNETT, WE'RE CINEBASE. LET'S GET

1 TOGETHER, AND THIS IS GOING TO BE A COUPLE OF YEAR PROJECT,  
2 AND YOU ARE GOING TO HAVE TO GIVE US SOME MONEY BECAUSE WE  
3 DON'T HAVE THE MONEY TO DO THE ENGINEERING THAT IT WOULD  
4 TAKE."

5 NOW, THAT'S NOT A SITUATION -- I MEAN, I THINK THAT  
6 THAT DOCUMENT SHOWS CLEARLY THE DIFFERENCES THAT WOULD BE  
7 INVOLVED IN TERMS OF HAVING A DATABASE WHICH IS RELATIONAL  
8 VERSUS A DATABASE THAT'S OBJECT ORIENTED. THEY ARE  
9 FUNDAMENTALLY DIFFERENT.

10 THE OTHER THING, THOUGH, IS IT ALSO SHOWS SOMETHING  
11 ABOUT THE REALITY OF THE FACT THAT WE DIDN'T TAKE ANYTHING.  
12 IF WE TOOK SOMETHING -- AND I THINK THE PHRASE THAT WAS USED  
13 WAS THAT WE TOOK EVERYTHING, "LOCK, STOCK AND BARREL."

14 WHY ARE WE SPENDING SO MUCH TIME AND ENERGY WRITING  
15 CODE FROM SCRATCH? WHY ARE WE WRITING THE CODE IN A NEW  
16 LANGUAGE THAT'S DIFFERENT FROM THE LANGUAGE -- AND THAT'S  
17 UNDISPUTED -- THAT CINEBASE'S CODE WAS WRITTEN IN? WHY ARE WE  
18 USING THIS NEW DATABASE AND SPENDING ALL KINDS OF TIME AND  
19 MONEY AND HIRING PEOPLE AND ENGINEERS AND SPENDING RESOURCES  
20 WHEN WHAT WE ALLEGEDLY DID WAS LIFT THIS THING, AND NOW WE ARE  
21 MARKETING IT AS THEIR PRODUCT WHEN IT'S OURS? I MEAN, IT  
22 MAKES NO SENSE.

23 WE HAVE PRODUCED TO THEM THE CODE. THEY HAVE THE  
24 SPECIFICATIONS. AND THERE IS NO EVIDENCE OF ANY TYPE AT ALL  
25 THAT THERE IS ANY COMMONALTY BETWEEN OUR CODE AND THEIR CODE.

1 THEY ARE DIFFERENT PIECES. THEY ARE DIFFERENT ANIMALS. THEY  
2 ARE DEVELOPED INDEPENDENTLY. AND BECAUSE OF THAT THERE IS NO  
3 WAY THAT CINEBASE CAN SHOW ULTIMATELY THAT ANYTHING WAS TAKEN  
4 IN THIS CASE.

5 THE SAME HOLDS TRUE FOR THEIR ALLEGATION THAT WE  
6 TOOK SOME MARKETING INFORMATION.

7 NOW, THIS GOES BACK TO THE POINT OF CINEBASE HAS  
8 NEVER TOLD US WHAT MARKETING INFORMATION WE TOOK OTHER THAN  
9 THIS WEINSTOCK REPORT THAT WE'VE ALREADY DISCUSSED.

10 BUT THE POINT TO UNDERSTAND, I THINK, HERE IS THAT  
11 MS. KROL HAD BEEN IN THE MARKETING POSITIONS AT OTHER  
12 COMPANIES BEFORE CINEBASE FOR A VERY LONG TIME. AND WHILE SHE  
13 WAS AT CINEBASE, SHE CERTAINLY MADE PHONE CALLS TO PEOPLE AND  
14 SHE MADE CONTACTS WITH PEOPLE AND SHE ENDEAVORED TO LOOK AT  
15 NEW BUSINESS OPPORTUNITIES THAT WOULD COME UP. BUT THAT WAS  
16 WORK THAT SHE DID. THAT WAS PART OF HER JOB, WHICH AT THE END  
17 OF HER JOB SHE WAS TOLD, BASICALLY, "KNOCK IT OFF. WE'RE NOT  
18 INTERESTED IN YOUR WORK IN ADVERTISING. WE DON'T CARE ABOUT  
19 IT. IN FACT, THE WORDS THAT WERE USED WERE, "IT'S A  
20 NUISANCE." BASICALLY, SHE WAS BEING VIEWED AS A DRAIN ON THE  
21 COMPANY'S RESOURCES.

22 WHY? WELL, THERE IS SOME BROAD, GENERAL, VAGUE  
23 DISCUSSION IN CINEBASE'S BUSINESS PLAN IN MARCH 1997. THAT'S  
24 THE DOCUMENT THAT WAS JUST DISCUSSED BEFORE THIS ARGUMENT  
25 BEGAN. AND IN MARCH OF 1997, THE BUSINESS PLAN MADE A

1 REFERENCE TO ADVERTISING. WELL, GUESS WHAT? THAT CHANGED.

2 AND, IF YOU WISH, I CAN ASK THE DEFENDANTS AT THIS  
3 POINT TO LEAVE THE ROOM BECAUSE I MAY NEED TO TALK ABOUT A  
4 DOCUMENT WHICH HAS BEEN DESIGNATED AS CONFIDENTIAL.

5 MR. KRUM: PLEASE. THANK YOU.

6 (DEFENDANTS ALLEN BROWN AND NATASHA KROL LEAVE THE  
7 COURTROOM.)

8 (PAGES 49 - 60 UNDER SEAL)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

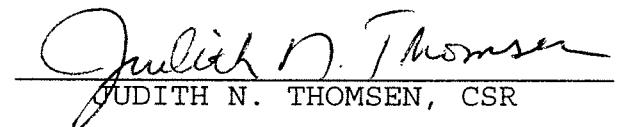
23

24

25

CERTIFICATE OF REPORTER

I, JUDITH N. THOMSEN, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 60, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

  
\_\_\_\_\_  
JUDITH N. THOMSEN, CSR